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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DENNIS ALLAN SVET, Defendant and Appellant.	E068713 (Super.Ct.No. FVI17001275) OPINION

APPEAL from the Superior Court of San Bernardino County. Lisa M. Rogan and Charles J. Umeda, Judges. Affirmed.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant Dennis Allan Svet appeals after the transfer of his probation from Orange County to San Bernardino County. Upon the transfer, the San Bernardino County Probation Department recommended additional terms and conditions of probation. Defendant objected to some of the new conditions, including the addition of obtaining written permission before leaving the state and an electronics-search condition. On appeal, defendant argues (1) the San Bernardino County Superior Court had no jurisdiction to add terms not previously imposed in Orange County because no change in circumstances existed to justify the additional terms; (2) the condition requiring him to obtain the probation officer's written permission before leaving the state must be stricken because it is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), unconstitutionally overbroad, and impermissibly restricts his right to travel; and (3) the condition requiring him to submit to search and seizure of any electronic device must be stricken because it is unreasonable under *Lent* and unconstitutionally overbroad in violation of the Fourth Amendment and his right to privacy. We reject these contentions and affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND[1]

In April 2014, a La Palma police officer issued defendant a citation for having an expired vehicle registration and for having a registration sticker affixed to his license plate that belonged to a different vehicle registered to American Honda Motor Company, Inc. Defendant had apparently obtained the vehicle registration sticker from an American Honda Motor Company employee with whom he had a personal relationship. During the stop, defendant gave the officer an old business card that identified him as a Senior Special Investigator for the DMV, even though he had been terminated from that position approximately 14 years earlier.

In August 2014, a DMV investigator checked defendant's vehicle registration and discovered that it was still expired. However, court records showed defendant's citation for having an expired registration had been dismissed based on proof of correction. Further investigation revealed that defendant had forged a Los Angeles County Sheriff's signature in order to falsely represent his registration was up to date.

In September 2014, a Fullerton Police Department officer located defendant parked on a public street with an expired vehicle registration and contacted the DMV. Defendant was also found in possession of a forged " 'One Day Trip Permit' from AAA and a box containing over 100 business cards identifying the [defendant] as a Senior

[1] The factual background is taken from the Orange County probation officer's report, the San Bernardino County probation officer's report, and the Department of Motor Vehicles (DMV) Report of Investigation.

Special Investigator with the DMV." The DMV investigator responded to the location to interview defendant regarding the false registration tag and seized the box of business cards.

On November 18, 2014, the Orange County District Attorney's office filed a complaint charging defendant with offering forged or altered documents as genuine (Pen. Code, § 132; count 1); falsifying documents (§ 134; count 2); and receiving stolen property (§ 496, subd. (a); count 3).

On June 3, 2016, the complaint was amended by interlineation to add forgery (Pen. Code, § 470, subd. (a)) as count 4. On that same day, pursuant to a plea agreement, defendant pleaded guilty to counts 1, 3, and 4. In return, the Orange County Superior Court dismissed count 2 and granted defendant formal probation for a period of five years on various terms and conditions of probation.

On February 16, 2017, the Orange County Probation Department filed a notice and motion to transfer defendant's case to San Bernardino County. Defendant waived his right to a hearing on the motion and agreed to the transfer of probation to San Bernardino County.

On April 24, 2017, the Orange County Superior Court granted the motion to transfer defendant's case to San Bernardino County pursuant to Penal Code section 1203.9.

On May 12, 2017, after the San Bernardino County Probation Department verified that defendant had permanently relocated to San Bernardino County, the San Bernardino County Superior Court accepted jurisdiction over defendant's case.

On May 30, 2017, the San Bernardino County Probation Department filed a report requesting additional terms and conditions in San Bernardino County to ensure officer safety and offender compliance. The additional terms included:

"043A Carry at all times a valid California Department of Motor Vehicles driver's license or identification card containing your true name, age, and current address; display such identification upon request by any peace officer and not use any other name for any purpose without first notifying the probation officer.

"008A Keep Probation Officer informed of place of residence and cohabitants: give written notice to the Probation Officer twenty-four (24) hours prior to any changes. Prior to any move provide written authorization to the Post Office to forward mail to the new address.

"009 Neither possess nor have under your control any dangerous or deadly weapons or explosive devices or materials to make explosive devices.

"007 Not leave the State of California without first obtaining written permission of the Probation Officer.

"008F Permit visits and searches of places of residence by agents of the Probation Department and/or law enforcement for the purpose of ensuring compliance with the terms and conditions of probation; not do anything to interfere with this requirement, or

deter officers from fulfilling this requirement, such as erecting any locked fences/gates that would deny access to Probation Officers, or have any animals on the premises that would reasonably deter, threaten the safety of, or interfere with officers enforcing this term.

"004A Report to the Probation Officer in person immediately or upon release and thereafter as directed. If you are removed from the United States, you are to report to the Probation Officer by phone or mail within fourteen (14) days of your release from immigration custody and inform Probation of your address and phone number.

"010B . . . [¶] Submit to search and seizure by a government entity of any electronic device that you are an authorized possessor of pursuant to P[enal] C[ode section] 1546.1 [subdivision] (c)(10)."

On June 15, 2017, the San Bernardino County Superior Court held a probation modification hearing. At that time, defendant's counsel objected to the imposition of the additional terms and conditions requested by the San Bernardino County Probation Department, arguing the court lacked jurisdiction to impose the additional terms. Defendant's counsel also objected to the electronics-search condition as unconstitutionally overbroad and not relevant to the underlying offense. The prosecutor replied that the electronics-search condition is related to defendant's rehabilitation and compliance with probation and that the inclusion of the condition is within the court's jurisdiction. The court found that in looking at Penal Code section 1546.1, subdivision (c)(10), and reviewing defendant's charges, the electronics-search condition is

reasonable. The court noted defense counsel's objection to the additional terms and imposed all of the terms and conditions recommended by the San Bernardino County Probation Department. Thereafter, the court continued the hearing to allow the San Bernardino Probation Department time to check with the Orange County Probation Department to determine what payments defendant had made toward the fines and fees ordered at the time defendant was placed on probation.

On June 20, 2017, the San Bernardino Probation Department verified that defendant had paid all fines and fees previously ordered by the Orange County Superior Court.

The continued modification of probation hearing was held on July 6, 2017. At that time, defendant's counsel renewed his objection as to the imposition of the additional terms and conditions recommended by the San Bernardino Probation Department, noting the electronics-search condition had no nexus to defendant's offense. Defendant's counsel also objected to the term prohibiting defendant from leaving the State of California without the probation officer's approval. The court found that defendant had paid all the fines and fees previously imposed, and noted defense counsel's objections to the imposition of the additional terms.

On July 10, 2017, defendant filed a timely notice of appeal

III

DISCUSSION

A. *Change in Circumstance*

Defendant argues the trial court acted in excess of its jurisdiction by imposing the additional terms and conditions recommended by the San Bernardino County Probation Department because the court's modification was not based on a change in defendant's circumstances. Specifically, defendant asserts that the transfer of supervision to San Bernardino County did not constitute a change in circumstances, and absent a change in circumstances, his probation conditions could not be modified. Defendant believes that the additional electronics-search condition not previously imposed by the Riverside County Superior Court must be stricken. The People respond the court had jurisdiction to modify defendant's probation conditions because a change in circumstances, namely defendant's move from Orange County to San Bernardino County, justified the modification.

A trial court generally has discretion in setting the appropriate terms and conditions of probation, parole, or supervised release: "In general, the courts are given broad discretion in fashioning terms of supervised release, in order to foster the reformation and rehabilitation of the offender, while protecting public safety. [Citations.] Thus, the imposition of a particular condition of probation is subject to review for abuse of that discretion. 'As with any exercise of discretion, the court violates this standard when it imposes a condition of probation that is arbitrary, capricious or exceeds the

bounds of reason under the circumstances. [Citation.]' [Citation.]" (*People v. Martinez* (2014) 226 Cal.App.4th 759, 764.)

Penal Code section 1203.9, subdivision (a)(1), governs the transfer of probation cases from one county to another and provides in pertinent part: "[W]henever a person is released on probation or mandatory supervision, the court, upon noticed motion, shall transfer the case to the superior court in any other county in which the person resides permanently, meaning with the stated intention to remain for the duration of probation or mandatory supervision, unless the transferring court determines that the transfer would be inappropriate and states its reasons on the record." Pursuant to subdivision (b) of Penal Code section 1203.9, "The court of the receiving county shall accept the entire jurisdiction over the case effective the date that the transferring court orders the transfer."

The procedure for transferring a case to another county is outlined in California Rules of Court, rule 4.530. (See Pen. Code, § 1203.9, subd. (f) [judicial council shall promulgate rules of court procedures for the transfer of probation cases].) Subdivision (h)(1)(B) of rule 4.530 provides: "The receiving court and receiving county probation department may impose additional local fees and costs as authorized." Further, subdivision (g) of rule 4.530 entitled "Transfer" provides in subsection (6), "Upon transfer the probation officer of the transferring county must transmit, at a minimum, any court orders, probation or mandatory supervision reports, and case plans to the probation officer of the receiving county."

Neither Penal Code section 1203.9 nor the California Rules of Court, rule 4.530 specifically address whether probation conditions can be modified upon transfer to another county.[2] Penal Code section 1203.3, subdivision (a), states "The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence." This section "broadly states the court's power to modify." (*People v. Cookson* (1991) 54 Cal.3d 1091, 1100 (*Cookson*).) A defendant is subject to notice, a hearing, and reasons for the modification to be placed on the record before the modification. (Pen. Code, § 1203.3, subd. (b).)

A court can modify a term of probation at any time before the expiration of that term and need not wait until a probation violation occurs. (*Cookson, supra*, 54 Cal.3d at p. 1098; see *People v. Leiva* (2013) 56 Cal.4th 498, 505.) In *Cookson*, the defendant was ordered to pay restitution for diverting construction funds at the time that his probation was granted, but the probation department set up an incorrect payment schedule resulting in insufficient funds being paid by defendant on the restitution when his probation term was set to expire. (*Cookson*, at p. 1094.) The superior court extended the time for probation in order for the defendant to be supervised while completing the payments on restitution. (*Id*. at pp. 1094-1095.)

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[2] Any clarification as to whether a transfer to another county qualifies in itself as a change in circumstances that authorizes a change in probation conditions, like the ability of the receiving county to change the fees and costs, will have to come from the Legislature.

The California Supreme Court noted that " 'An order modifying the terms of probation *based upon the same facts* as the original order granting probation is in excess of the jurisdiction of the court, for the reason that there is no factual basis to support it.' " (*Cookson, supra*, 54 Cal.3d at p. 1095.) Although the defendant had complied with all of the probation conditions, and the miscalculation of the monthly payments was solely the fault of the probation officer, our Supreme Court determined "the Court of Appeal correctly determined that a change in circumstance could be found in a fact 'not available at the time of the original order,' namely, 'that setting the pay schedule consistent with [the] defendant's ability to pay had resulted in defendant's inability to pay full restitution as contemplated within the original period of probation." (*Ibid*.)

Here, the People assert the change in circumstances was that defendant moved his permanent place of residence from Orange County to San Bernardino County. The San Bernardino County Probation Department recommended additional terms and conditions commonly used in San Bernardino County, presumably to ensure officer safety and offender compliance. The transfer of the instant case from Orange County to San Bernardino County constituted a fact not available at the time of the original order. Upon transfer, defendant's probation was overseen by a new probation officer and court, with different standards of practice regarding probationers. The San Bernardino County Probation Department's suggested changes to the conditions were reasonably related to ensure officer safety and defendant's compliance and rehabilitation. The additional terms and conditions were aimed at ensuring defendant's rehabilitation. Defendant voluntarily

moved to San Bernardino County and San Bernardino County is a large, spread-out county, the largest county in the continental United States. The San Bernardino County Superior Court was entitled to consider defendant's new circumstances when the case was transferred to San Bernardino County, and to apply new conditions appropriate in supervising San Bernardino County probationers.

Furthermore, the additional terms and conditions are reasonably related to preventing future criminality and necessary in aiding defendant's rehabilitation. (See *People v. Olguin* (2008) 45 Cal.4th 375, 379-380 (*Olguin*) [test for valid probation conditions].) Term Nos. 043A (carry a valid California driver's license or identification), 008A (keep probation officer informed of place of residence), 009 (not use or possess controlled substances), 007 (not leave state without written permission of probation officer), 08F (permit probation to visit and search residence), and 010B (submit to search and seizure by a government entity of any electronic devices in probationer's possession) promoted the San Bernardino County Probation Department's ability to identify, supervise, and rehabilitate defendant. In fact, conditions 008A, 007, 08F, and 010B were no different than the conditions imposed in Orange County requiring defendant to violate no law; cooperate and follow all reasonable directives of the probation officer; and submit to immediate search of person, home, and property by a law enforcement officer. Moreover, the additional electronics-search condition is no more intrusive than the condition imposed in Orange County requiring defendant to submit to immediate search of person, home, and property by a law enforcement officer.

Based on the foregoing, we conclude the San Bernardino County Superior Court had jurisdiction to modify the conditions of defendant's probation. The new additional conditions were reasonably related to the goal of maintaining supervision and safety of the officers, as well as, defendant's offenses and rehabilitation.

B. *Travel Approval and Electronic Devices Search Conditions*

Defendant contends the probation condition requiring him to obtain the probation officer's written permission before leaving the state is invalid under *Lent*, is unconstitutionally overbroad, and impermissibly restricts his right to travel. He also argues that the probation condition requiring him to submit his electronic devices to search or seizure by law enforcement officers is unreasonable under *Lent* and unconstitutionally overbroad in violation of the Fourth Amendment and his right to privacy. For the reasons explained below, we disagree.

1. Applicable Principles

A grant of probation is an act of clemency in lieu of punishment. (*People v. Moran* (2016) 1 Cal.5th 398, 402 (*Moran*).) Probation is a privilege, and not a right. A court has broad discretion to impose "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, . . . and generally and specifically for the reformation and rehabilitation of the probationer . . . ." (Pen. Code, § 1203.1, subd. (j); *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) "If a probation condition serves to rehabilitate and protect public safety, the condition may 'impinge upon a constitutional right

otherwise enjoyed by the probationer, who is "not entitled to the same degree of constitutional protection as other citizens." ' " (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355 (*O'Neil*).)

A condition of probation will not be upheld, however, if it (1) has no relationship to the crime of which the defendant was convicted, (2) relates to conduct that is not criminal, and (3) requires or forbids conduct that is not reasonably related to future criminality. (*Olguin*, *supra*, 45 Cal.4th at pp. 379-380; see *Lent*, *supra*, 15 Cal.3d at p. 486.) Our high court has clarified that this "test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Olguin*, at p. 379.)

However, "[j]udicial discretion to set conditions of probation is further circumscribed by constitutional considerations." (*O'Neil*, *supra*, 165 Cal.App.4th at p. 1356.) "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153; accord, *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346 (*Pirali*).)

We generally review the imposition of probation conditions for an abuse of discretion, and we independently review constitutional challenges to probation conditions de novo. (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723 (*Appleton*).) Based on the foregoing, we address the merits of defendant's arguments below.

2. Travel Approval Condition—Analysis

Defendant argues the probation condition requiring him to "not leave the State of California without first obtaining written permission of the Probation Officer" is invalid under *Lent*, is unconstitutionally overbroad, and restricts his right to travel. The People respond defendant forfeited his constitutional challenge to the condition or, in the alternative, the People maintain the condition is valid.

Initially, we reject the People's claim defendant forfeited his constitutional challenge to the travel approval condition. Although the failure to make a timely objection to a probation condition ordinarily forfeits the claim of error on appeal, where a claim that a probation condition is facially overbroad and violates fundamental constitutional rights is based on undisputed facts, it may be treated as a question of law which is not forfeited by failure to raise it in the trial court. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 881, 888-889; *People v. Quiroz* (2011) 199 Cal.App.4th 1123, 1127 [forfeiture rule does not apply to defendant's contention that as a matter of law a probation condition, on its face, is unconstitutionally vague and overbroad].) Accordingly, we address defendant's claims on their merits.

The environment in which a probationer serves probation is an important factor as to whether the probation will be successfully completed, and thus, directly impacts the likelihood of effective rehabilitation. (*People v. Robinson* (1988) 199 Cal.App.3d 816, 818.) Although conditions requiring prior approval of a probationer's residence may affect the constitutional rights to travel and freedom of association (*People v. Bauer* (1989) 211 Cal.App.3d 937, 944), courts have the authority to do so if there is an indication the probationer's living situation contributed to the crime or would contribute to future criminality. (*People v. Soto* (2016) 245 Cal.App.4th 1219, 1228 (*Soto*).)

Here, the travel approval condition is reasonable under the circumstances of this case. Although traveling outside of California is not itself criminal and the condition is not related to the offenses defendant committed, the travel approval condition is reasonably related to preventing future criminality, as it assists the probation officer in his or her duty of supervising defendant. Leaving the state, especially for a long period of time, would interfere with the probation officer's ability to effectively supervise defendant. It could also hinder defendant's rehabilitation and successful compliance with other probationary conditions. The travel approval condition enables the effective supervision of defendant and is reasonably related to future criminality.

Defendant relies on *Soto*, *supra*, 245 Cal.App.4th 1219. In that case, the Court of Appeal struck down a probation condition requiring the defendant, who was convicted of driving under the influence of alcohol with a suspended license, to obtain prior approval before changing his place of residence from Monterey County or leaving the state. (*Id*. at

pp. 1226-1227.) The Court of Appeal did not reach the question whether the condition was constitutionally overbroad, but held it was unreasonable under the facts of the case, and therefore an abuse of discretion to impose it. (*Ibid*.) The Court of Appeal stated, "there is nothing in the record to indicate that defendant's living situation contributed to his crime or would contribute to his future criminality. The only mention of defendant's living situation is contained in the probation report, which indicated that defendant had a stable residence and was living with his brother. In sum, there is nothing to suggest that leaving Monterey County or the State of California would have an effect on defendant's rehabilitation." (*Id*. at p. 1228.)

The instant case is distinguishable from *Soto*. Although at the time of the transfer hearing defendant was residing in an apartment in Barstow, the DMV investigation and probation reports indicate that defendant did not have a stable living situation in the past. He was sleeping on the couch of the friend who supplied him with the false registration sticker. The record also indicates he may have been living in his car at some point before moving to San Bernardino County. Moreover, defendant continued to falsely identify himself as a DMV Senior Special Investigator to law enforcement officials while on probation. During his first probation appointment in June 2016, defendant immediately handed the probation officer a DMV business card with the State seal identifying himself as a DMV Senior Special Investigator. The card was seized along with additional business cards found in defendant's wallet during a subsequent search. Defendant denied having any more business cards. However, additional business cards were found in

defendant's vehicle in October 2016. The probation officer reported, "it is believed [defendant] has continued to use the business cards to manipulate, intimidate or curry favor from others by representing himself as a law enforcement official." The probation report also notes that defendant minimized the current offense for which he was placed on probation. Defendant also informed his probation officer that he should have falsified the smog certificate rather than the vehicle registration, suggesting a lack of remorse. Without the limitations placed by the condition, defendant could, for example, opt to leave the state for extended periods of time, thereby depriving himself of the stability and supervision he needs to succeed on probation.

Defendant claims the probation condition gave probation "unfettered discretion" in deciding whether to allow appellant to leave the state. Contrary to defendant's contention, there is nothing to suggest that defendant's reasonable requests to travel out of state to visit relatives or friends would be disapproved. Our Supreme Court in *Olguin*, *supra*, 45 Cal.4th at page 382, stated that a probation condition "should be given 'the meaning that would appear to a reasonable, objective reader.' " We view the travel approval condition here in light of *Olguin* and presume a probation officer will not withhold approval for irrational or capricious reasons. (*Id*. at p. 383; see *People v. Stapleton* (2017) 9 Cal.App.5th 989, 996-997 ["A probation officer cannot issue directives that are not reasonable in light of the authority granted to the officer by the court."]; *People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240 [probation conditions are limited by reasonableness "[s]ince the court does not have the power to impose

unreasonable probation conditions, [and therefore] could not give that authority to the probation officer"].)

Defendant also asserts that the travel approval condition is unconstitutionally overbroad and impermissibly infringes on his right to interstate travel. Defendant does not fully elucidate his argument with respect to how this particular probation condition is facially overbroad. Instead he simply asserts that it infringes on his right to travel. We disagree with the suggestion that a probation condition requiring a probationer to seek and obtain the approval of his or her probation officer before leaving the state is not sufficiently tailored and reasonably related to the compelling state interest of facilitating supervision and rehabilitation of the probationer. Indeed, "[i]mposing a limitation on probationers' movements as a condition of probation is common, as probation officers' awareness of probationers' whereabouts facilitates supervision and rehabilitation and helps ensure probationers are complying with the terms of their conditional release." (*Moran*, *supra*, 1 Cal.5th at p. 406.)

In fact, as defendant acknowledges, despite being frequently subjected to as-applied challenges regarding the proper scope, the imposition of travel restrictions subject to permission being granted by probation is regularly upheld. (See *People v. Relkin* (2016) 6 Cal.App.5th 1188, 1195-1196 (*Relkin*) [upholding against constitutional overbreadth challenge a probation condition similarly requiring defendant to obtain written permission from probation officer prior to leaving state]; *In re Antonio R.* (2000) 78 Cal.App.4th 937, 942 [same].) "Although criminal offenders placed on probation

retain their constitutional right to travel, reasonable and incidental restrictions on their movement are permissible." (*Moran, supra,* 1 Cal.5th at pp. 406-407.) Such a condition is in the public interest, as it assists the probation department in determining "defendant meets the standards of the Uniform Act for Out-of-State Probationer and Parolee Supervisions before he is allowed to go to another state (Pen. Code, § 1203.) Also it minimizes extradition problems." (*People v. Thrash* (1978) 80 Cal.App.3d 898, 902.) "[T]he condition's limitation on interstate travel is closely tailored to the purpose of monitoring defendant's travel to and from California not by barring his ability to travel altogether but by requiring that he first obtain written permission before doing so." (*Relkin*, *supra*, 6 Cal.App.5th at p. 1195.) Thus, the imposition of a travel restriction is not a facial violation of a probationers' right to travel. (*Moran*, at p. 406 ["Although criminal offenders placed on probation retain their constitutional right to travel, reasonable and incidental restrictions on their movement are permissible"].) We therefore conclude that there is nothing facially inappropriate about the contested travel approval condition.

Based on the foregoing, we find the travel approval condition is not unconstitutionally overbroad and it did not unreasonably restrict defendant's right to interstate travel.

3. Electronics-Search Condition—Analysis

Defendant also challenges the electronics-search condition, which states: "Submit to a search and seizure by a government entity of any electronic device that you

are an authorized possessor of pursuant to P[enal] C[ode Section]1546.1[, subdivision](c)(10)." Defendant argues that the electronics-search condition has no relationship to the crimes of which defendant was convicted, and it involves conduct that is not itself criminal. Defendant further contends that the electronics-search condition is not reasonably related to future criminality because there was no evidence connecting his use of an electronic device to his offenses or to a risk of future criminal conduct. He also asserts that the condition is unconstitutionally overbroad in violation of the Fourth Amendment and his right to privacy.

The People do not address the first two *Lent* prongs—the electronics-search condition has no relationship to defendant's offenses, and the use of electronic devices is not itself criminal. Rather, the parties agree that the validity of the electronics-search condition turns on the application of the third *Lent* factor—whether the electronics-search condition is reasonably related to preventing future criminality. (See *Olguin*, *supra*, 45 Cal.4th at p. 379.)

The issue of the validity of an electronics-search condition under *Lent* and its progeny is pending before our high court. (See, e.g., *People v. Ermin* (July 10, 2017, H043777) [nonpub. opn.], review granted Oct. 25, 2017, S243864; *People v. Nachbar* (2016) 3 Cal.App.5th 1122 (*Nachbar*), review granted Dec. 14, 2016, S238210; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted Apr. 13, 2016, S232849; *In re Ricardo P.* (2015) 241 Cal.App.4th 676 (*Ricardo P.*), review granted Feb. 17, 2016, S230923.) We

also note that currently there is a split of authority regarding the validity of broad electronics-search conditions of probation, and those cases are also pending before the California Supreme Court. (See *People v. Trujillo* (2017) 15 Cal.App.5th 574 (*Trujillo*), review granted Nov. 29, 2017, S244650; *People v. Bryant* (2017) 10 Cal.App.5th 396 (*Bryant*), review granted June 28, 2017, S241937; *In re R.S.* (2017) 11 Cal.App.5th 239, review granted July 26, 2017, S242387; *In re Patrick F.* (2015) 242 Cal.App.4th 104 (*Patrick F.*), review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556 (*Alejandro R.*), review granted Mar. 9, 2016, S232240; *In re J.E.* (2016) 1 Cal.App.5th 795 (*J.E.*), review granted Oct. 12, 2016, S236628.) Until we receive further direction, we must undertake to resolve this case based on our construction of the applicable law.

Our colleagues in Division One of this court addressed a challenge by a defendant subjected to an electronics-search probation condition in *Trujillo*, *supra*, 15 Cal.App.5th 574, which we discuss in detail for its persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).) The defendant's crime had no relation to the probation condition, and the main issue, as here, is whether the condition was reasonably related to future criminality. The court explained that "a probation condition 'that enables a probation officer to supervise his or her charges effectively is . . . "reasonably related to future criminality." ' [Citations.] Because the probation officer is responsible for ensuring the probationer refrains from criminal activity and obeys all laws during the probationary period, the court may appropriately impose conditions intended to aid the probation

officer in supervising the probationer and promoting his or her rehabilitation. [Citations.] 'This is true "even if [the] condition . . . has no relationship to the crime of which a defendant was convicted." ' " (*Trujillo*, at p. 583, italics omitted.)

In *Trujillo*, our colleagues held the trial court did not abuse its discretion: "If the court permits this young convicted felon to avoid prison through probation despite his violent offenses, the court has the authority to take steps to help ensure Trujillo will remain crime free and that public safety objectives are satisfied. As our high court has observed, the purpose of requiring Fourth Amendment search waivers as a probation condition is ' " 'to determine not only whether [the probationer] disobeys the law, but also whether he obeys the law. Information obtained [from an unexpected and unprovoked search] afford[s] a valuable measure of the effectiveness of the supervision given the defendant . . . .' " ' [Citations.] The trial court had a reasonable basis to conclude the most effective way to confirm Trujillo remains law abiding is to permit his electronic devices to be examined, rather than relying on a meeting or a telephone conversation. This required Fourth Amendment waiver is not open-ended, it applies only during the probation period. If Trujillo is successful at his probation, the Fourth Amendment waiver will terminate and his electronic devices will again be completely private. The court made the factual determination that the electronics-search condition is necessary to provide appropriate supervision for Trujillo while he is on probation. Under *Lent* and *Olguin*, the court did not err in reaching this conclusion." (*Trujillo, supra*, 15 Cal.App.5th at pp. 583-584.) The *Trujillo* court further rejected the notion, suggested in

cases such as *In re Erica R.* (2015) 240 Cal.App.4th 907, that the Trujillo defendant's failure to use an electronic device in committing his crimes or the lack of any connection between such a device and the crimes rendered the search condition unreasonable as a matter of law. (*Trujillo*, at p. 584.)

We are persuaded by *Trujillo*'s reasoning and apply it in this case. Moreover, pending further guidance from the Supreme Court, we take the *Olguin* opinion at its word: "A condition of probation that enables a probation officer to supervise his or her charges more effectively is . . . 'reasonably related to future criminality.' " (*Olguin*, *supra*, 45 Cal.4th at pp. 380-381.) In this case, the trial court was aware that defendant had pleaded guilty to offering false evidence in court, receiving stolen property, and forgery with intent to defraud. The electronics-search condition at issue here allows law enforcement to supervise defendant more effectively. His conditions of probation include violating no laws; cooperating and following all reasonable directives of the probation officer; not possessing dangerous or deadly weapons; and not knowingly associating with convicted felons or anyone actively engaged in criminal activity. Searching defendant's electronic devices will assist law enforcement in determining whether he is complying with these conditions. Indeed, given the current ubiquity of electronic communications and interactions, an electronics-search condition may well be the only way for a probation officer to discover the bulk of the information relevant to potential criminality and compliance with other conditions of probation. A defendant engaged in illegal activities, for example, is much more likely to have digital photographs or

communications relating to such activities stored on an electronic device than print photographs and written correspondence stored at home. The electronics-search condition is therefore reasonably related to future criminality. (See *In re P.O.* (2016) 246 Cal.App.4th 288, 295; see *J.E.*, *supra*, 1 Cal.App.5th at p. 801; *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1176-1177.) We conclude the court did not abuse its discretion in ordering the condition under *Lent*, *supra*, 15 Cal.3d 481.

In our view, the electronics-search condition (and consequent burden) is akin to the standard three-way search condition—of a defendant's person, residence, and vehicles—routinely imposed as a condition of probation and required by regulation as a condition of parole. (See, e.g., *People v. Ramos* (2004) 34 Cal.4th 494, 505-506; *People v. Burgener* (1986) 41 Cal.3d 505, 532, disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 753; *In re Binh L.* (1992) 5 Cal.App.4th 194, 202-203.) One appellate court recognized that a computer hard drive is the digital equivalent of its owner's home in terms of the breadth of private information involved. (*People v. Michael E.* (2014) 230 Cal.App.4th 261, 277, citing *United States v. Mitchell* (11th Cir. 2009) 565 F.3d 1347, 1351.) It follows that, just like a defendant's home, a computer hard drive is properly and reasonably the subject of a search condition. Defendant has not shown the trial court's imposition of the electronics-search condition encompassing such digital information was unreasonable or an abuse of discretion.

As noted, defendant also challenges the electronics-search condition as unconstitutionally overbroad in violation of the Fourth Amendment and his right to privacy. We disagree.

" 'A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' [Citation.] 'The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' " (*Pirali*, *supra*, 217 Cal.App.4th at p. 1346.) Here, the record reflects some evidence of the legitimate purpose of the restriction, as we have discussed above: preventing future criminality by promoting effective supervision. The condition may place a burden, in the abstract, on defendant's general right to privacy based on the possibility of a search of his electronic devices. But, as a defendant under probation supervision, his privacy rights are "diminished," i.e., they may more readily be burdened by restrictions that serve a legitimate purpose. (See *Nachbar*, *supra*, 3 Cal.App.5th at p. 1129; *J.E.*, *supra*, 1 Cal.App.5th at p. 805.) On the current record, we conclude the burden on defendant's privacy right is insufficient to show overbreadth, given the legitimate penological purpose shown for searching defendant's electronic devices.

Additionally, as our colleagues did in *Trujillo*, we reject defendant's argument that the electronics-search condition is unconstitutionally overbroad as violating his fundamental privacy rights under *Riley v. California* (2014) 573 U.S. __ [134 S.Ct. 2473] (*Riley*). In *Riley*, the Unites States Supreme Court held that the warrantless search of a suspect's cell phone implicated and violated the suspect's Fourth Amendment rights. (*Riley*, at p. __ [134 S.Ct. at pp. 2482-2483].) The court explained that modern cell phones, which have the capacity to be used as mini-computers, can potentially contain sensitive information about a number of areas of a person's life. (*Id*. at p. __ [134 S.Ct. at p. 2489].) The court emphasized, however, that its holding was only that cell phone data is subject to Fourth Amendment protection, "not that the information on a cell phone is immune from search." (*Riley*, at p. __ [134 S.Ct. at p. 2493].)

In *Trujillo*, the appellate court distinguished *Riley*, and followed authority explaining that the overbreadth analysis is materially different from the warrant requirement at issue in that case. (*Trujillo*, *supra*, 15 Cal.App.5th at p. 587.) The court observed that probationers do not enjoy the absolute liberty to which law-abiding citizens are entitled, and that courts routinely uphold broad probation conditions permitting searches of a probationer's residence without a warrant or reasonable cause. (*Id.* at pp. 587-588.) Like the defendant in *Trujillo* (*id*. at pp. 588-589), defendant does not challenge the probation condition authorizing officers to conduct random and unlimited searches of his residence at any time and for no stated reason, and he made no showing that a search of his electronic devices would be any more invasive than an unannounced,

without-cause, warrantless search of his residence. Here, as in *Trujillo*, the record supports a conclusion that the electronics-search condition is necessary to protect public safety and to ensure defendant's rehabilitation during his supervision period, and a routine search of defendant's electronic data "is strongly relevant to the probation department's supervisory function." (*Id*. at p. 588.) We adopt a similar conclusion as *Trujillo*: "Absent particularized facts showing the electronics-search condition will infringe on [defendant's] heightened privacy interests, there is no reasoned basis to conclude the condition is constitutionally overbroad or to remand for the court to consider a more narrowly drawn condition." (*Id*. at p. 589.)

Defendant suggests we should follow the decisions invalidating the condition as overbroad in *Appleton*, *supra*, 245 Cal.App.4th at p. 723, *Ricardo P.*, *supra*, 241 Cal.App.4th 676, and *Alejandro R.*, *supra*, 243 Cal.App.4th 556. These cases are distinguishable or do not support defendant's argument under the circumstances of this case.

Ricardo P., *supra*, 241 Cal.App.4th 676 and *Alejandro R.*, *supra*, 243 Cal.App.4th 556 considered a juvenile probation condition requiring the minor to submit his electronic devices for warrantless searching and to provide all passwords to such devices. (*Ricardo P.*, at pp. 886-887; *Alejandro R.*, at pp. 654-655.) The *Ricardo P.* court concluded that although an electronics-search condition was valid under *Lent* because it was reasonably related to monitoring the minor's future criminality, the condition was overbroad in allowing the probation officer access to data that was not reasonably likely to reveal

whether the minor was using drugs. (*Ricardo P.*, at pp. 886-887, 889-997.) It also rejected the minor's claim that the condition posed a risk of electronic eavesdropping based on his lack of standing to raise the issue on behalf of the third parties who were arguably affected. (*Id*. at pp. 888-889.) Likewise, the *Alejandro R.* court held that the condition requiring disclosure of all of the minor's passwords was unconstitutionally overbroad because it was not narrowly tailored to limit the impact on the minor's privacy right. (*Alejandro R.*, at pp. 567-568.) Passwords and family member devices are not at issue here, and defendant makes no argument that the manner of searching should be limited. *Ricardo P*. and *Alejandro R.* do not support defendant's position.

Similarly, *Appleton*, *supra*, 245 Cal.App.4th 717 found a penological justification in preventing the defendant from "us[ing] social media to contact minors for unlawful purposes." (*Id*. at p. 727.) Given that limited justification, the court struck a general electronics-search condition and remanded the matter to the trial court to craft a narrower condition. (*Ibid*.) Here, the penological justification is not so limited, and *Appleton* is inapplicable. Moreover, in *Appleton*, the court rejected an electronics-search condition on the premise that *Riley* held that police could not ordinarily search a smartphone incident to arrest, and that, absent other exigent circumstances, a warrant was required to make such a search. However, the court in *Trujillo*, *supra*, 15 Cal.App.5th 574, and *Nachbar*, *supra*, 3 Cal.App.5th 1122 disagreed with *Appleton*. We recognize that our high court has granted review in *Trujillo* and *Nachbar* pending resolution of *Ricardo P.*, *supra*, 241 Cal.App.4th 676. Pending further direction from our high court, we continue

to adhere to the views expressed in *Trujillo* and *Nachbar*, namely, that the "privacy concerns voiced in *Riley* are inapposite in the context of evaluating the reasonableness of a probation condition." (*Nachbar*, at p. 1129.)

The court in *Appleton* struck a probation condition allowing probation access to recordable media and computers based on the fact personal information may be on such devices, thus making the intrusion too broad. (See *Appleton*, *supra*, 245 Cal.App.4th at pp. 728-729.) As we have noted, the court in *Appleton* relied heavily on the discussion in *Riley* about the privacy interests an individual has in his or her smartphone, to find a search warrant was required to access this and similar devices. The *Riley* court did not hold that electronic devices are immune from search, but only that they cannot be searched incident to lawful arrest as an ordinary exception to the warrant requirement. (See *Riley*, *supra*, 573 U.S. __ [134 S.Ct. 2473].) However, the instant case does not involve an exception to the warrant clause, as was the case in *Riley*. Rather, it involves a specific probation condition imposed by the trial court that restricts the exercise of the constitutional rights of defendant, who must be supervised for rehabilitation and prevention of crime. *Riley* is therefore inapposite since it arose in a different Fourth Amendment context. *Riley* also did not consider the constitutionality of conditions of probation, parole, or mandatory supervision. Persons on probation do not enjoy the absolute liberty to which every citizen is entitled and the court may impose reasonable conditions that deprive an offender of some freedoms enjoyed by law-abiding citizens. (*United States v. Knights* (2001) 534 U.S. 112, 119 [probationers]; see *In re Q.R.* (2017)

7 Cal.App.5th 1231, 1238, review granted Apr. 12, 2017, S240222 [*Riley* involved a person's "preconviction expectation of privacy"].)

Defendant insists the electronics-search condition is overbroad because the term "government entity" allows a "larger class of persons" to search his electronic devices than just law enforcement. The phrase "search and seizure by any government entity," however, is pursuant to Penal Code section 1546.1, subdivision (c)(10). In addition, "search and seizure by any government entity" means searches by law enforcement officers in light of the entire language used in term 010B. That term, specifically, provides: "Submit to a search and seizure of your person, residence and/or property under your control, at any time of the day or night, without a search warrant by any law enforcement officer; and with or without cause . . . . [¶] Submit to search and seizure by a government entity of any electronic device that you are an authorized possessor of pursuant to P[enal] C[ode Section]1546.1[, subdivision](c)(10)." Probation conditions are interpreted with common sense and in context. (See *In re Ramon M.* (2009) 178 Cal.App.4th 665, 677.) Read in its full context, the phrase "government entity" means law enforcement.

We also reject defendant's claim that the electronics-search condition is invalid because it violates third-party privacy rights by requiring him to submit to search and seizure of any electronic device in his possession. Defendant did not raise this issue in the trial court and, as a result, has forfeited the argument on appeal. (*Sheena K.*, *supra*, 40 Cal.4th at p. 885 [forfeiture rule applies to appellate claims of error "involving

discretionary sentencing choices or unreasonable probation conditions"].) Defendant's claim also fails because he does not have standing to assert the rights of unidentified individuals who are not parties to this case. (*B.C. Cotton, Inc. v. Voss* (1995) 33 Cal.App.4th 929, 947-948 ["courts will not consider issues tendered by a person whose rights and interests are not affected"].)

While searches involving electronic devices may raise unique issues of privacy not found in searches of these more traditional categories, we see no need to depart from our well-established treatment of search conditions whenever the condition implicates electronic devices. As *J.E.* explained, "courts have historically allowed parole and probation officers significant access to other types of searches, including home searches, where a large amount of personal information—from medical prescriptions, banking information, and mortgage documents to love letters, photographs, or even a private note on the refrigerator—could presumably be found and read. [Citations.] In cases involving probation or parole house search conditions, we have found no instances in which courts have carved out exceptions for the same type of information [the minor] argues could potentially be on his electronics." (*J.E.*, *supra*, 1 Cal.App.5th at p. 804, fn. 6.) As we have explained, nothing in the record here justifies narrowing the challenged electronics-search condition.

Based on the foregoing reasons, we conclude the electronics-search condition is not unconstitutionally overbroad and does not substantially limit defendant's Fourth Amendment and privacy rights.

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

SLOUGH
J.